

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2010-02 IT
November 18, 2010

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ISSUES**Adjusted Gross Income Tax – Nexus**

A company ("Taxpayer") is seeking an opinion as to whether its business activities in the State of Indiana are sufficient to create nexus and subject the company to the Indiana Adjusted Gross Income Tax.

Authority: 15 USC 381; [IC 6-3-2-2\(a\)](#); [45 IAC 3.1-1-38](#)

STATEMENT OF FACTS

Taxpayer provides the following facts regarding its request for a revenue ruling. Taxpayer, which is not headquartered or incorporated in Indiana, sells employee-specific gifts and products to employers that want to recognize specific employee milestones. In particular, Taxpayer provides:

Many of the products offered by the Taxpayer as recognition awards are personalized or customized by the Taxpayer. These awards may be customized to fit a particular occasion, and may involve casting, stamping, stone setting, polishing or laser customization. The Taxpayer's manufacturing facilities and inventory warehousing are located [outside Indiana].

The Taxpayer also utilizes relationships with vendors to offer other gift items by third parties, including custom-designed gifts.... The Taxpayer utilizes sales representatives to solicit sales of its products throughout the United States. In a typical transaction, the Taxpayer's customer agrees to purchase gifts and products from the Taxpayer on behalf of the employees it wishes to recognize. The Taxpayer's customers provide information to the Taxpayer concerning their employees and specify the dates and/or milestones on which they wish a packet or a gift to be sent to an employee. The Taxpayer maintains and tracks this information in its database at its headquarters [outside Indiana]. When an applicable milestone occurs (e.g., a milestone anniversary of a hiring date), the Taxpayer will automatically send a specific packet or gift to the employee. An employee selected to receive a gift receives a personalized packet that is either mailed to the employee's home address or delivered through the employer's human resources department. The selected employee may select a gift from the packet and place an order by: 1) calling the Taxpayer's toll-free telephone number, 2) mailing the order to the Taxpayer, or 3) logging on to the Taxpayer's [Web site]. The selected gift is then shipped via U.S. postal service or common carrier. The Taxpayer is compensated by its customers based on the type and quantity of products shipped to the customer's employees.

Taxpayer further provides the following detailed description of its business activities:

1. The Taxpayer's business activities in Indiana consist exclusively of utilizing sales representatives to solicit orders for sales of gifts and products that companies can use to recognize and reward their employees.
2. Orders for sales of the Taxpayer's products are sent outside of Indiana for approval or rejection.
3. If approved, orders for sales of the Taxpayer's products are filled by shipment or delivery from a point outside Indiana. For certain products, the Taxpayer utilizes a direct ship process with vendors that warehouse and ship goods directly to the Taxpayer's customers. As such, certain products may be filled from a point inside of Indiana but at no time does Taxpayer assume title to such goods.
4. The Taxpayer's products are shipped exclusively via U.S. postal service or common carrier.
5. The Taxpayer does not maintain or make use of any office or place of business in Indiana.
6. The Taxpayer does not own and/or lease, as lessor or lessee, any real or tangible personal property in Indiana.
7. The Taxpayer does not have inventories, including inventories on consignment in Indiana.
8. The Taxpayer does not use its own vehicles to ship its products into Indiana.
9. The Taxpayer does not repair or service any personal or real property within Indiana.
10. The Taxpayer does not install or assemble any products within Indiana.
11. The Taxpayer does not engage in collections activity or credit investigation within Indiana.
12. The Taxpayer does not train personnel within Indiana.
13. The Taxpayer does not bring any equipment or tangible personal property into Indiana in conducting its business activity.
14. The Taxpayer does not engage any third parties to perform the activities described in items 5 through 13 on its behalf.

Based on the foregoing facts, Taxpayer requests a ruling that its business activities in the State of Indiana are not sufficient to create nexus and subject the company to the Indiana Adjusted Gross Income Tax.

DISCUSSION

In general, the adjusted gross income tax is imposed on corporations and nonresident persons under [IC 6-3-2-2\(a\)](#), which provides in relevant part:

With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", [sic] for the purposes of this article, shall mean and include:

- (1) income from real or tangible personal property located in this state;
- (2) income from doing business in this state;
- (3) income from a trade or profession conducted in this state;
- (4) compensation for labor or services rendered within this state; an
- (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter.

The Department's regulation, found at [45 IAC 3.1-1-38](#), provides the following clarification of [IC 6-3-2-2\(a\)](#): For apportionment purposes, a taxpayer is "doing business" in a state if it operates a business enterprise or activity in such state including, but not limited to:

- (1) Maintenance of an office or other place of business in the state
- (2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
- (3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
- (4) Rendering services to customers in the state
- (5) Ownership, rental or operation of a business or of property (real or personal) in the state
- (6) Acceptance of orders in the state
- (7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

As stated in Regulation 6-3-2-2(b)(010) [[45 IAC 3.1-1-37](#)], corporations doing business in Indiana as well as other states are subject to the allocation and apportionment provisions of [IC 6-3-2-2\(b\)-\(n\)](#).

Of relevance here is 15 USC 381 (P.L. 86-272), which prohibits states from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. As such, a state may not impose an income tax on income derived from business activities within that state if those activities do not exceed the mere solicitation of sales. The provisions outlined in [45 IAC 3.1-1-38](#) constitute a minimum threshold of activity in which an entity must engage to establish nexus with the state such that taxation would not be prohibited under P.L. 86-272.

In the case at hand, Taxpayer's business activities in Indiana do not include any of the activities outlined in [45 IAC 3.1-1-38](#). Taxpayer does not maintain an office or other place of business in Indiana. Taxpayer does not maintain an inventory of merchandise or material for sale, distribution, or manufacture; nor does Taxpayer maintain an inventory of consigned goods in Indiana. Taxpayer neither sells nor distributes merchandise to customers in this state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution. Taxpayer does not render services to customers in this state. Taxpayer does not own, rent or operate a business or property (real or personal) in Indiana. Nor does Taxpayer accept orders in this state or perform any other action that exceeds the mere solicitation of orders.

RULING

Taxpayer's business activities in the State of Indiana are not sufficient to create nexus and subject the company to the Indiana Adjusted Gross Income Tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Indiana Department of State Revenue

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